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# Impeachment of Verdicts by Jurors—Rule of Evidence 606(b)

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## IMPEACHMENT OF VERDICTS BY JURORS—RULE OF EVIDENCE 606(b)

*In 1977 the Minnesota Supreme Court adopted the Minnesota Rules of Evidence, modeled after the Federal Rules of Evidence. Rule 606(b), like its common law counterpart, generally prohibits jurors from testifying as to alleged acts of jury misconduct. Proponents of the rule argue forcefully that it is needed to ensure the privacy of jury deliberations, to avoid juror harassment by disgruntled litigants, and to encourage the finality of verdicts. This Note reviews the common law development of this rule forbidding juror testimony and the legislative history of Rule 606(b). Recognizing the policies underlying Rule 606(b), this Note nonetheless questions the propriety of the rule and asserts that those policies can be furthered through less drastic means, while permitting litigants who have been victimized by prejudicial misconduct to present evidence from the only source that normally knows of the misconduct—the jurors themselves.*

I.	INTRODUCTION	417
II.	COMMON LAW APPROACH	418
	A. <i>The Common Law Rule</i>	418
	B. <i>Constitutional Limitations</i>	421
	C. <i>Conclusion</i>	424
III.	RULE 606(b)	424
	A. <i>Federal Rule 606(b)</i>	424
	1. <i>History of Rule 606(b)</i>	424
	2. <i>Scope of Rule 606(b)</i>	426
	3. <i>Case Law Regarding Rule 606(b)</i>	428
	B. <i>Minnesota Rule 606(b)</i>	431
	1. <i>Minnesota Common Law Prior to Rule 606(b)</i>	432
	2. <i>Minnesota Law After Adoption of Rule 606(b)</i>	435
	3. <i>Procedure for Receiving Juror Testimony</i>	436
IV.	AN EVALUATION OF THE POLICIES UNDERLYING RULE 606(b)	439
	A. <i>Privacy of Deliberations</i>	440
	B. <i>Finality of Verdicts</i>	441
V.	CONCLUSION	443

### I. INTRODUCTION

Protection of the jury deliberation process is a fundamental concern in our judicial system. This concern, however, can conflict with the interest in preventing injustice in cases where a jury or one of its members may have committed error that is prejudicial to one of the litigants. The question of whether jurors should be permitted to testify as to their acts or statements during the trial can be crucial to the objecting litigant's claim because the jurors often are the only ones who have knowl-

edge of the alleged juror misconduct.<sup>1</sup> Courts generally have responded to this dilemma by prohibiting jurors from testifying or submitting affidavits about the alleged misconduct after the jury has been dismissed, although the common law rules and the statutes dealing with this potentially serious problem do vary from jurisdiction to jurisdiction. Recently the Minnesota Supreme Court adopted rules of evidence for Minnesota state courts<sup>2</sup> modeled after the Federal Rules of Evidence.<sup>3</sup> One of these rules, 606(b), now governs the question of whether a juror is competent to testify for the purpose of impeaching a civil or criminal verdict.

This Note examines the common law rules regarding when a juror will be permitted to testify to impeach a verdict,<sup>4</sup> the history and effect of Rule 606(b),<sup>5</sup> and the propriety of Rule 606(b).<sup>6</sup> This Note will not focus on the various acts which might constitute jury misconduct or the conditions under which persons other than jurors may testify as to jury misconduct.<sup>7</sup>

## II. COMMON LAW APPROACH

### A. *The Common Law Rule*

When confronted with allegations of jury misconduct, courts at common law generally followed the rule that jurors will not be allowed to impeach their verdict.<sup>8</sup> Stated initially by Lord Mansfield in *Vaise v. Delaval*,<sup>9</sup> this rule was based on the rationale that a witness should not be allowed to allege his own turpitude.<sup>10</sup> Although this rationale has

1. See, e.g., Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 57 (1975).

2. See Order Promulgating the Rules of Evidence, 308 Minn. app. (1978).

3. MINN. R. EVID., Prelim. Comment.

4. See notes 8-47 *infra* and accompanying text.

5. See notes 48-136 *infra* and accompanying text.

6. See notes 137-46 *infra* and accompanying text.

7. For a discussion of the various acts which might constitute jury misconduct, see Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 366-72 (1958).

8. See, e.g., *McDonald v. Pless*, 238 U.S. 264 (1915); *Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (per curiam); *Hurlburt v. Leachman*, 126 Minn. 180, 148 N.W. 51 (1914).

In *McDonald*, the Court stated that "unquestionably the general rule, [is] that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." 238 U.S. at 269.

9. 99 Eng. Rep. 944 (K.B. 1785).

10. This doctrine apparently was misapplied to jurors by Lord Mansfield, as both English and American courts had received juror affidavits or testimony to impeach a verdict without hesitation prior to his decision. See 8 J. WIGMORE, EVIDENCE § 2352, at 696-97 (McNaughton rev. 1961). In *Vaise*, affidavits of jurors that their verdict was based on chance were rejected by the court:

The Court cannot receive such an affidavit from any one of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such

been abandoned,<sup>11</sup> courts continue to apply the Mansfield rule, generally refusing to permit the use of juror affidavits or testimony regarding jury misconduct to impeach a verdict.<sup>12</sup> The policy justifications for such a rule appear to be twofold: secrecy of jury deliberations<sup>13</sup> and finality of verdicts.<sup>14</sup>

The policies behind the rule disallowing juror testimony to impeach a verdict may be sound,<sup>15</sup> but the fact remains that jurors sometimes act in a manner which constitutes prejudicial misconduct, thus indicating that a fair trial did not occur. To protect litigants from the effects of such misconduct, courts have developed exceptions to the Mansfield rule, permitting jurors to testify to the existence of some forms of misconduct occurring during the trial. The majority of the courts have adopted a fairly strict interpretation of the Mansfield rule, providing only a very limited number of exceptions that permit a juror's testimony.<sup>16</sup> In some of these jurisdictions, the only exception under which a juror is competent to testify to impeach a verdict is when the verdict was reached by lot or by chance;<sup>17</sup> other jurisdictions, however, might permit impeachment of the verdict based on a juror's independent inspection of the scene of the accident,<sup>18</sup> juror intoxication,<sup>19</sup> or a quotient verdict.<sup>20</sup>

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as from some person having seen the transaction through a window, or by some such other means.

99 Eng. Rep. at 944 (footnotes omitted).

11. See, e.g., *People v. Hutchinson*, 71 Cal. 2d 342, 346-51, 455 P.2d 132, 135-37, 78 Cal. Rptr. 196, 198-201 (juror affidavits admissible, but evidence limited to that which may be corroborated by sight, hearing, and other senses), *cert. denied*, 396 U.S. 994 (1969); 8 J. WIGMORE, *supra* note 10, § 2352.

12. See notes 16-26 *infra* and accompanying text. The doctrines of privileged communications and parol evidence are generally considered to provide the present support for the Mansfield rule. See generally 8 J. WIGMORE, *supra* note 10, §§ 2346-2356; Note, *supra* note 1, at 64-70.

13. See notes 139-43 *infra* and accompanying text.

14. See pp. 441-43 *infra*.

15. For a discussion of these policies, see notes 137-44 *infra* and accompanying text.

16. For a discussion of the status of the rule and the exceptions allowed in various jurisdictions, see 8 J. WIGMORE, *supra* note 10, § 2354.

17. See *Brauer v. James J. Igoe & Sons Constr., Inc.*, 186 N.W.2d 459, 474 (N.D. 1971); *Ky. R. CRIM. P. 10.04, construed in Brown v. Commonwealth*, 490 S.W.2d 731, 732 (Ky. 1973); *N.D.R. Civ. P. 59(b)(2)*.

18. See, e.g., *City of Bloomington v. Vinge*, 284 Minn. 202, 204-09, 169 N.W.2d 752, 754-56 (1969); *Spinner v. McDermott*, 190 Minn. 390, 251 N.W. 908 (1933); *People v. DeLucia*, 20 N.Y.2d 275, 279, 299 N.E.2d 211, 214, 282 N.Y.S.2d 526, 530 (1967).

19. See, e.g., *Bateman v. Donovan*, 131 F.2d 759, 765 (9th Cir. 1942); *Perry v. Bailey*, 12 Kan. 539, 544-45 (1874).

20. See, e.g., *City of Wichita v. Stallings*, 59 Kan. 779, 54 P. 689 (1898); *Gordon v. Trevathan*, 13 Mont. 387, 34 P. 185 (1893) (quotient verdict considered to be verdict by chance).

A quotient verdict is reached where each juror writes down the total damages that he or she thinks should be awarded; these amounts are added together and divided by the number of jurors, thus arriving at an average award. Such a verdict is invalid, however,

An attempt to limit the occasional harshness and injustice which results from a strict interpretation of the Mansfield rule has led to its modification in some jurisdictions. This minority position, commonly known as the Iowa rule,<sup>21</sup> permits juror affidavits or testimony "to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself . . . ."<sup>22</sup> Under the Iowa rule, jurors are competent to testify to the occurrence or nonoccurrence of objective facts or overt acts, but are incompetent to testify to subjective facts such as the effect of overt acts upon a juror's thinking.<sup>23</sup> Given this distinction, a juror can testify about prejudicial statements and acts occurring in or out of the jury room, but evidence concerning a juror's mental processes or the effect of any misconduct in influencing that juror's vote is excluded.<sup>24</sup> Such subjective matters as improper motive,

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only if the jurors agree in advance to accept the result and do not reconsider the amount after the calculation. *See, e.g.,* *Slack v. Nease*, 255 Iowa 958, 966-67, 124 N.W.2d 538, 543 (1963); *Hoffman v. City of St. Paul*, 187 Minn. 320, 323, 245 N.W. 373, 374-75 (1932); *Ken-Crete Prods. Co. v. State Highway Comm'n*, 24 Wis. 2d 355, 363, 129 N.W.2d 130, 134 (1964).

21. The Iowa rule was stated as follows:

That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

. . . .  
 . . . [T]o receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them.

*Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210-11 (1866).

The dividing line thus appears to be between "overt acts," such as extraneous conditions or occurrences that bear on the verdict, and matter that "inheres" in the verdict itself, such as the mental and emotional processes involved in assenting to or dissenting from the verdict.

22. *Id.* at 210.

23. *See* Comment, *Jury Misconduct in Personal Injury Litigation in Texas—A Need for Further Reform*, 21 Sw. L.J. 493, 497-98 (1967); Comment, *supra* note 7 at 362-64. *See generally* Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849 (1962).

24. *See Osterfoss v. Illinois Cent. R.R.*, 215 N.W.2d 233 (Iowa 1974) (even if affidavits showed that the jury relied on matters outside the scope of the instructions, those matters

bias, prejudice, misunderstanding the instructions or the evidence, and misconceiving the legal consequences of the verdict are considered to inhere in the verdict<sup>25</sup> and thus are not subject to juror testimony to impeach the verdict.<sup>26</sup> The judge then considers the juror's testimony regarding the objective facts or overt acts, determines the probable effect they had on the jury's verdict, and decides accordingly whether prejudicial jury misconduct occurred.<sup>27</sup>

### B. Constitutional Limitations

The common law rules excluding juror testimony, particularly as applied in criminal cases, may be affected in certain circumstances by constitutional guarantees of confrontation and due process.<sup>28</sup> The possibility that the admission of evidence of juror misconduct may be required by the Constitution was first raised in the United States Supreme Court case of *Parker v. Gladden*.<sup>29</sup> In *Parker*, the Court considered testimony by jurors that a bailiff had made comments to the jury about the defendant. The Court held that the bailiff had become a witness against the defendant and therefore was subject to cross-examination. Because the defendant was not given the opportunity to cross-examine the bai-

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were elements which inhere in the verdict and could not be used to impeach it); *Fischer, Inc. v. Standard Brands, Inc.*, 204 N.W.2d 579, 585 (Iowa 1973) (juror may testify as to what actually occurred in the jury room, for that is testimony as to a fact, which does not inhere in the verdict; but a juror cannot testify as to what influenced his verdict); *Bashford v. Slater*, 250 Iowa 857, 867, 96 N.W.2d 904, 910 (1959) (juror may not impeach verdict by testifying to reason he reached it, but if what occurred in jury room amounts to misconduct and if the misconduct was of such character that it is reasonable to believe that it did influence the final verdict, juror's affidavit or testimony is admissible and the verdict will not be allowed to stand), *decision on remand rev'd on other grounds*, 252 Iowa 726, 108 N.W.2d 474 (1961); *Hackaday v. Brackelsburg*, 248 Iowa 1346, 1350, 85 N.W.2d 514, 516 (1957) (jurors can testify concerning what occurred in the jury room; however, jurors cannot testify concerning the effect which the occurrences in the jury room allegedly had upon the verdict).

25. Each of these matters represents a state of mind in the individual jurors. As such, they are not capable of being established by another person because verbal statements or acts may not accurately reflect a particular state of mind. Thus, they are said to inhere in the verdict. See *Carlson & Sumberg, Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 257; Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 269-71 (1970).

26. See, e.g., *Osterfoss v. Illinois Cent. R.R.*, 215 N.W.2d 233, 237 (Iowa 1974); *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866). For further discussion of the Iowa rule, see *Carlson & Sumberg, supra* note 25, at 255-58.

27. See, e.g., *Osterfoss v. Illinois Cent. R.R.*, 215 N.W.2d 233, 237 (Iowa 1974); *Hackaday v. Brackelsburg*, 248 Iowa 1346, 1350-51, 85 N.W.2d 514, 517 (1957).

28. Although the cases that have considered the possible constitutional ramifications of a rule excluding juror testimony as to juror misconduct appear to be entirely in the area of criminal law, an argument based on a denial of due process might also be applicable to a civil case. See Note, *Constitutional Law: Rule Prohibiting Impeachment of Verdicts by Jurors as Deprivation of Due Process*, 14 OKLA. L. REV. 533 (1961).

29. 385 U.S. 363 (1966) (per curiam).

liff, the Court held that the defendant was denied his right of confrontation under the sixth amendment.<sup>30</sup>

Although the issue of the admissibility of juror testimony for the purpose of impeaching a verdict was not raised in *Parker*,<sup>31</sup> the issue was presented in *People v. DeLucia*.<sup>32</sup> In *DeLucia* the defendants submitted statements from a number of jurors that some of the jurors had made an unauthorized visit to the scene of the crime. The state court denied a motion to set aside the verdict, holding that jurors could not impeach their verdict.<sup>33</sup> The Court of Appeals for the Second Circuit dismissed the defendants' habeas corpus action without prejudice and sent the case back to the state court to determine the defendants' claims in light of the "newly articulated federal right" created in *Parker*.<sup>34</sup> Back in state court, the New York Court of Appeals held that the juror affidavits were admissible not only as to third-party interference with the jury but also as to the jury's consideration of any outside evidence.<sup>35</sup> Basing its decision on a violation of the defendants' sixth amendment confrontation rights, the court stated: "[W]here the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in the determination is the right of the defendant to prove facts substantiating his claim."<sup>36</sup>

The question of the admissibility of juror testimony to impeach a verdict was raised again in *United States ex rel. Owen v. McMann*.<sup>37</sup> In support of a motion for a new trial, the defendant in *Owen* submitted juror affidavits that some jurors had made remarks about unfavorable incidents in the defendant's life which were not part of the record or related to the charge. The state courts denied the defendant's motion and a writ of habeas corpus was sought in federal district court. The district court, after examining the jurors, set aside the conviction based on a deprivation of the sixth amendment right of confrontation.<sup>38</sup> On appeal the Second Circuit Court of Appeals affirmed the district court's

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30. *Id.* at 364. The Court further stated that the bailiff's conduct involved such a probability of prejudice that the trial was "deemed inherently lacking in due process." *Id.* at 365 (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)).

31. In fact, the Court considered testimony by one juror that she was prejudiced by the bailiff's statements. See 385 U.S. at 365. Under even the most liberal form of the common law rule excluding juror testimony, such evidence probably would be excluded. See notes 21-26 *supra* and accompanying text.

32. 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377, *cert. denied*, 382 U.S. 821 (1965), *petition for writ of habeas corpus dismissed without prejudice sub nom.* *United States v. McMann*, 373 F.2d 759 (2d Cir.), *rehearing granted*, 19 N.Y.2d 837, 227 N.E.2d 316, 280 N.Y.S.2d 402, *rev'd on second appeal*, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

33. See 15 N.Y.2d at 296, 206 N.E.2d at 325, 258 N.Y.S.2d at 378.

34. 373 F.2d at 762.

35. See 20 N.Y.2d at 279, 229 N.E.2d at 214, 282 N.Y.S.2d at 530.

36. *Id.* at 278, 229 N.E.2d at 213, 282 N.Y.S.2d at 528.

37. 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

38. 435 F.2d at 815-16.

decision but rejected the basis on which it was made. Clearly concerned with the "fragile state of criminal convictions,"<sup>39</sup> the court was unwilling to hold that jurors automatically become witnesses against a defendant, and thereby subject to the confrontation clause, merely by making extra-record remarks to other jurors. Rather, the court felt that the nature of what was said and the probability of prejudice were the determining factors. Based on the findings of the district court, the Second Circuit determined that the probability of prejudice was sufficient to render the verdict "inherently lacking in due process."<sup>40</sup> Citing the *DeLucia* decision as controlling, the court held that the jurors' affidavits were admissible to prove the denial of due process.<sup>41</sup>

The decisions in both *Parker* and *DeLucia* probably are consistent in their results with the general common law exceptions to the rule that jurors cannot impeach their own verdict.<sup>42</sup> In *Parker*, the prejudicial statements were made by a person who was not a juror and, although the jurors may have engaged in misconduct by taking those statements into account in reaching a decision, their testimony related specifically to the prejudicial statements of the bailiff.<sup>43</sup> In effect, therefore, the jurors were testifying as to the existence of an outside influence which, under common law, has been recognized as an exception to the Mansfield rule. Similarly, in *DeLucia* the juror misconduct was an unauthorized viewing of the scene of the crime, a situation in which many courts at common law would allow the jurors to testify to impeach a verdict.<sup>44</sup> The *Owen* decision, however, appears to have taken a step beyond any common law exceptions because most courts at common law have consistently precluded jurors from testifying about comments by jurors during deliberations.<sup>45</sup> Thus, a defendant, at least in the Second Circuit, now may have a due process argument for the introduction of juror testimony in situations that the common law did not previously recognize. Perhaps, by extending the due process argument, a defendant may be able to convince a court to permit the jurors to impeach their verdict on the basis of other types of jury misconduct.<sup>46</sup>

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39. *Id.* at 817.

40. *Id.* at 818 (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)).

41. *See id.* at 819-20.

42. *See* notes 16-26 *supra* and accompanying text.

43. The majority rule, as applied in most states, does not exclude juror testimony as to the misconduct of third persons. *See* 8 J. WIGMORE, *supra* note 10, § 2354, at 716. *But see* *Gardner v. Minea*, 47 Minn. 295, 50 N.W. 199 (1891) (verdict cannot be impeached by juror affidavits regarding misconduct of bailiff).

44. *See* 8 J. WIGMORE, *supra* note 10, § 2354, at 702 n.2 (collecting cases); Palmer, *Post-Trial Interview of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 Hous. L. Rev. 290, 303-04 (1968); Annot., 58 A.L.R.2d 1147 (1958).

45. *See* 8 J. WIGMORE, *supra* note 10, § 2354, at 702 n.2 (collecting cases).

46. Merely convincing the court to permit the introduction of juror testimony is only the first step, however, because the court must also review the testimony to determine whether there is a sufficient showing of denial of due process to reverse or to order a new



### C. Conclusion

While each jurisdiction provides some exceptions to the rule which generally precludes jurors from impeaching their verdict, the exceptions among the various jurisdictions lack uniformity. The same act of jury misconduct, in two different states, may give two different results.<sup>47</sup> In one state a litigant will be able to introduce competent evidence, in the form of juror testimony, which will provide that litigant with a remedy for an improper verdict, such as a new trial. But in another state the litigant may have no remedy for the unfair verdict. In all jurisdictions, however, some acts which are clearly improper will be allowed to affect verdicts with impunity if there is no one to testify about those acts other than the jurors. The only alternative that an aggrieved litigant might have in such a situation may be to argue that the principles enunciated in *DeLucia* and *Owen*, whether based on confrontation or due process, require the admission of juror testimony in instances where such testimony is not allowed under common law or by statute.

### III. RULE 606(b)

Both the federal courts and the Minnesota courts apply Rule 606(b). Because the Minnesota version of Rule 606(b) is modeled after the federal rule, a discussion of the federal rule is relevant to the Minnesota rule. Set forth below is a discussion of the federal rule followed by a discussion of the Minnesota rule.

#### A. Federal Rule 606(b)

##### 1. History of Rule 606(b)

In an effort to standardize the rules of evidence throughout the federal judicial system, Congress enacted the Federal Rules of Evidence, which took effect on July 1, 1975.<sup>48</sup> Rule 606(b) sets forth the standard under which a juror will be competent to testify as a witness upon an inquiry into the validity of a verdict. The rule states:<sup>49</sup>

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trial. See, e.g., *Murphy v. Florida*, 421 U.S. 794 (1975) (upholding conviction of defendant where jury improperly learned of defendant's extensive criminal record); *State v. Beier*, \_\_\_ Minn. \_\_\_, 263 N.W.2d 622 (1978) (conviction upheld where jurors were aware of additional charges against defendant). See also Nordby, *The Craft of the Criminal Appeal*, 4 WM. MITCHELL L. REV. 1, 26-28 (1978) (discussion of the harmless error doctrine and its relationship to due process).

47. Compare, e.g., *Spinner v. McDermott*, 190 Minn. 390, 251 N.W. 908 (1933) (affidavits of jurors as to unauthorized view admitted to prove misconduct) with, e.g., *Miller v. Illinois Cent. R.R.*, 36 Wis. 2d 184, 192-94, 152 N.W.2d 898, 902-03 (1967) (affidavits of jurors as to unauthorized view held inadmissible).

48. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.

49. FED. R. EVID. 606(b). The rule was amended by Act of Dec. 12, 1975, Pub. L. No. 94-149, § 1(10), 89 Stat. 805, which substituted "which" for "what" in the last sentence as a technical correction.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

As stated, the rule is not concerned with what types of jury misconduct will provide a basis for a new trial, but only with determining the circumstances under which a juror will be permitted to testify regarding the alleged misconduct and thereby impeach the verdict.<sup>50</sup>

The rule as finally adopted had undergone a fairly significant change from what was originally proposed by the Advisory Committee in its 1969 Preliminary Draft and retained in its 1971 Revised Draft. As initially proposed, the rule provided:<sup>51</sup>

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Under this rule, a juror would not be precluded from testifying about acts or statements occurring during deliberations, but only as to the effect of such acts or statements upon the juror's decision.<sup>52</sup> Thus, the rule was originally drafted in conformity with the Iowa rule,<sup>53</sup> which was thought to be the trend,<sup>54</sup> distinguishing between testimony as to subjective mental processes and testimony regarding objective conditions or occurrences, without regard to where the misconduct took place.

When the Supreme Court presented the rules to Congress for passage, Rule 606(b) had been altered to conform with the majority common law approach,<sup>55</sup> reading basically as it was finally enacted. The House of

50. FED. R. EVID. 606(b), Notes of Advisory Comm. on Proposed Rules, *reprinted in* 28 U.S.C.A. FED. R. EVID. 249 (1975).

51. Fed. R. Evid. 6-06(b) (Prelim. Draft Mar. 31, 1969), *reprinted in* 46 F.R.D. 289-90 (1969). *See also* Fed. R. Evid. 606(b) (Rev. Draft Mar. 15, 1971), *reprinted in* 51 F.R.D. 386-87 (1971).

52. *See* S. REP. NO. 93-1277, 93d Cong., 2d Sess. 13-14, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7060.

53. *See* notes 21-27 *supra* and accompanying text.

54. H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 9-10 (1973), *reprinted in* 28 U.S.C.A. FED. R. EVID. 247-48 (1975).

55. *See* H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 9-10 (1973), *reprinted in* 28 U.S.C.A. FED. R. EVID. 247-48 (1975).

Representatives, however, changed the rule back to the objective-subjective distinction initially proposed by the Advisory Committee, and passed the rule in that form.<sup>56</sup> This action was taken upon the recommendation of the House Judiciary Committee, which was persuaded that the better practice would be to permit juror testimony as to objective misconduct.<sup>57</sup> Under this formulation of the rule, the House apparently was in general agreement that misconduct in the form of a quotient verdict, for example, would permit impeachment by the jurors.<sup>58</sup>

Following the suggestion of the Senate Judiciary Committee, however, the Senate amended the rule to return to the majority approach suggested by the Supreme Court.<sup>59</sup> The Senate committee believed that the extension of juror competency to impeach a verdict, as provided by the House bill, was "unwarranted and ill-advised."<sup>60</sup> Further, the committee saw a need for finality to litigation and the preservation of absolute privacy in juror deliberations.<sup>61</sup>

In conference, the Senate amendment was determined to be the better version. The conference committee therefore adopted the rule as passed by the Senate<sup>62</sup> and returned the bill, which was passed by both the House and Senate without further amendment.<sup>63</sup>

An examination of the progression of Rule 606(b) through Congress illustrates that the rule is intended to parallel closely the majority common law approach relating to the exclusion of juror testimony to impeach a verdict. The more liberal approach embodied in the Iowa rule was expressly rejected, thus indicating that Congress intended the rule to be construed restrictively.

## 2. Scope of Rule 606(b)

Rule 606(b) is clear in stating that, with two exceptions, a juror will not be permitted to testify about anything that occurs during the course of the deliberations or about the effect of acts or statements on any juror's decision. Thus, the rule retains the exclusion of subjective evi-

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56. H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 2366-94 (1974).

57. See H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 9-10 (1973), reprinted in 28 U.S.C.A. FED. R. EVID. 247 (1975). Thus, the House adopted the position of the Advisory Committee. See notes 51-54 *supra* and accompanying text.

58. H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 2374-75 (1974).

59. Compare H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 36925-26, 37064, 37069, 37075-83 (1974) with FED. R. EVID. 606(b) and text accompanying note 55 *supra*.

60. S. REP. NO. 93-1277, 93d Cong., 2d Sess. 13-14, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7060.

61. S. REP. NO. 93-1277, 93d Cong., 2d Sess. 13-14, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7060.

62. H.R. CONF. REP. NO. 93-1597, 93d Cong., 2d Sess. (1974), reprinted in 28 U.S.C.A. FED. R. EVID. 248 (1975).

63. See H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 40069-70 (1974) (Senate); *id.* at 40890-97 (House).

dence relating to mental processes, plus apparently excluding evidence of objective acts, such as a verdict by lot, a quotient verdict, coercion by another juror, the drunken condition of a juror, or any other act or statement occurring during deliberations and within the jury room. That a juror cannot testify to such misconduct would appear to be clear from a reading of the congressional debate that took place during consideration of the rule.<sup>64</sup>

The rule does provide, however, two exceptions which permit members of a jury to impeach a verdict through their own testimony. One exception allows a juror to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention . . . ." Under this exception a juror should be permitted to present evidence, for example, that a juror made an independent inspection or experiment, that a media account was improperly mentioned during deliberations, or that a juror gained extra-record information through discussion with parties, witnesses, or others.<sup>65</sup> The extent to which this exception will permit juror testimony regarding extraneous prejudicial information may give rise to some difficulty in interpretation of the rule. When a juror, during deliberation, relates information to the other jurors that was not introduced at trial, a court may have difficulty determining whether the information involved commonly known facts, which jurors generally are expected to use, or specialized or personal knowledge, which jurors should not be permitted to use.<sup>66</sup>

The second exception provided by Rule 606(b) permits juror testimony as to "whether any outside influence was improperly brought to bear upon any juror." Thus, for example, a juror should be permitted to testify as to the existence of threats made by a nonjuror upon the safety of a jury member or a juror's family, a juror's acceptance of a bribe, or any other act or statement by a nonjuror which might have had the effect of improperly influencing a juror's decision.<sup>67</sup> Permitting jurors to testify as to the existence of external pressures is consistent with the policy of retaining the integrity of the jury process.<sup>68</sup>

64. See H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 2374-75 (1974).

65. See 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 606[04], at 31-34 (1977). The effect of such conduct is to bring evidence not presented during trial to the attention of the jurors. The evidence must, of course, be shown to be prejudicial to the losing litigant. See note 69 *infra* and accompanying text.

66. See *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 150-51 (3d Cir. 1975) (while jurors may not consider specific extra-record evidence about the case on trial, whether in the form of fact or opinion, "it is not necessary that the jurors be 'totally ignorant about a' case'"), *cert. denied*, 424 U.S. 917 (1976). The courts "cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations." *United States v. McKinney*, 429 F.2d 1019, 1022-23 (5th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971). See generally Comment, *supra* note 7, at 366-69.

67. See 3 J. WEINSTEIN & M. BERGER, *supra* note 65, ¶ 606[04], at 31.

68. When the verdict has been affected by external pressures, it cannot be said to be

Regardless of how these exceptions are interpreted, a mere showing of jury misconduct will not by itself require a new trial. In addition, the court must determine whether the misconduct was sufficiently prejudicial to the losing litigant.<sup>69</sup>

### 3. Case Law Regarding Rule 606(b)

Since its passage by Congress, Rule 606(b) has been considered infrequently by the federal courts. In *United States v. Eagle*,<sup>70</sup> the defendant had filed an affidavit asserting that during trial one of the jurors realized that the defendant had also been charged with a felony in an unrelated incident. On appeal, the Eighth Circuit stated that to overturn a verdict based on jury misconduct a defendant must be able to produce evidence which is not barred by the rule precluding juror testimony.<sup>71</sup> The court further stated that Rule 606(b) was a codification of the common law rule dealing with juror testimony and that the general rule under both the common law and Rule 606(b) prohibited the testimony, with an exception for testimony regarding extraneous information or improper influence.<sup>72</sup> Here, the defendant argued that the realization by the juror constituted "extraneous influence" and that therefore the juror was competent to testify under the rule.<sup>73</sup> Without discussing whether the juror's knowledge would constitute extraneous prejudicial information or outside influence under the rule, the court found there was no contention that the juror had voiced his realization to the other jurors.<sup>74</sup> The court thus affirmed the lower court's decision on the basis of a lack of

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solely the product of the jurors. Thus, the jurors should be allowed to testify to the occurrence of such pressures.

69. See, e.g., *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 153-54 (3d Cir. 1975) (presumption that verdict is valid is the general rule, although certain misconduct constitutes prima facie case of prejudice), cert. denied, 424 U.S. 917 (1976); *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975) (rebuttable presumption of prejudice); *United States v. Certain Land in the City of Lincoln*, 343 F. Supp. 155, 161 (D. Neb. 1972) (information held prejudicial); *Kilgore v. Greyhound Corp.*, 30 F.R.D. 385, 389 (E.D. Tenn. 1962) (misconduct nonsupportive of presumption of improperly influenced jury; held no prejudice).

70. 539 F.2d 1166 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977).

71. See 539 F.2d at 1169.

72. See *id.* at 1170.

73. *Id.*

74. The defendant had failed to claim that the juror had discussed his suspicions with the other jurors, and, in fact, the juror had submitted an affidavit specifically denying that he made any mention of his ideas to the others. This proved to be fatal to the defendant's claim. See *id.*

Whether the court would have considered the defendant's claim to come within the extraneous influence exception in Rule 606(b) had the juror voiced his thoughts to the other jurors is unknown. If communicated to other jurors, however, such information would seem to have a sufficient possibility of prejudice that the court should allow the jurors to testify. The court could then decide whether the information was sufficiently prejudicial to warrant a new trial or other remedy.

an overt act, stating that the defendant's allegations did not go beyond the mental processes of the particular juror.<sup>75</sup> Such a holding is consistent with the language of Rule 606(b) in that evidence of extraneous prejudicial information will be permitted only where it has been brought to the jury's attention. Permitting such testimony without some overt act communicating the information of one juror to other jurors would give the "secret thought of one [juror] the power to disturb the expressed conclusion of twelve."<sup>76</sup>

In *United States v. Homer*<sup>77</sup> a Pennsylvania federal district court, confronted with allegations of jury misconduct, looked to a pre-Rule 606(b) case which set forth guidelines under which a juror could impeach the verdict. Quoting extensively from *Government of Virgin Islands v. Gereau*,<sup>78</sup> the *Homer* court adopted an interpretation of "extraneous influence" to mean "publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons . . . ."<sup>79</sup> Discussion among jurors, intimidation of one juror by another juror, or other intrajury influences on the verdict were stated not to come within the exception;<sup>80</sup> thus juror testimony regarding such occurrences must be excluded. The court then set forth Rule 606(b) as also providing clear and succinct guidelines<sup>81</sup> but did not discuss the language of the rule, apparently opting to examine jury misconduct in light of earlier case law. Turning to the alleged misconduct, the court first held that evidence that jurors had failed to understand certain matters relating to their verdict was clearly excluded as impermissible impeachment of a verdict by a juror.<sup>82</sup> Juror testimony that two jurors had watched television in violation of the court's instructions was permitted, but the court found that nothing prejudicial had been communicated to these jurors by the television, nor had anything they heard been communicated to the other jurors. Therefore the court held that the defendant was not prejudiced.<sup>83</sup> With regard to alleged disparaging com-

75. See *id.*

76. *Id.* But see, e.g., *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.) (fair system for the administration of justice must include the guaranty of impartial jury in criminal cases, and if only one juror is unduly biased, prejudiced, or improperly influenced the criminal defendant is denied sixth amendment right to impartial jury), *cert. denied*, 434 U.S. 818 (1977); *People v. Harris*, 43 Mich. App. 746, 751, 204 N.W.2d 734, 737 (1972) (dictum) (if single juror is improperly influenced, the verdict is as unfair as if all were).

77. 411 F. Supp. 972 (W.D. Pa.), *aff'd*, 545 F.2d 864 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

78. 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

79. 411 F. Supp. at 977 (quoting *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975)).

80. *Id.* at 977 (quoting *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149-50 (3d Cir. 1975)).

81. *Id.* at 978.

82. See *id.* (failure to understand court's instructions).

83. See *id.* at 979-80.

ments by various jurors, the court appears to have considered evidence of a remark made outside of the jury room, finding that it was not prejudicial; other disparaging remarks made during deliberations, however, were found to inhere in the verdict, thereby precluding juror testimony about such statements.<sup>84</sup>

While the existing case law under federal Rule 606(b) is sparse,<sup>85</sup> it does indicate that the courts will follow the intent of Congress and exclude most juror testimony as to jury misconduct. Moreover, *Homer* suggests the courts will rely heavily upon pre-Rule 606(b) case law when interpreting the exceptions to the rule.<sup>86</sup> Application of the rule should be affected, however, by the same constitutional considerations discussed earlier in relation to the common law rules.<sup>87</sup>

Despite the expected heavy reliance upon pre-Rule 606(b) common law, the rule appears to be more restrictive than the common law in two respects. First, some overt acts occurring during the course of jury deliberations, about which jurors might have been able to testify under various common law majority approaches, may be excluded under the rule. For example, juror testimony as to a quotient verdict, a verdict by chance, or juror intoxication probably will be inadmissible under the

84. See *id.* at 980.

85. Since Rule 606(b) became effective, it apparently has been mentioned in only six cases other than *Eagle* and *Homer*. See *United States v. Hockridge*, 573 F.2d 752, 758-60 (2d Cir. 1978) (Rule 606(b) applied in situation of partial verdict after which jury continues to deliberate on other counts); *United States v. Gambina*, 564 F.2d 22, 24 (8th Cir. 1977) (Rule 606(b) prohibits juror from impeaching verdict except in narrow circumstances that involve extraneous matters or improper influence; no allegation that juror saw or heard anything outside of the record; defendant merely attempting to examine the mental processes of jurors; request to examine jurors to see if they were influenced by security measures denied); *Poches v. J.J. Newberry Co.*, 549 F.2d 1166, 1169 (8th Cir. 1977) (affidavit as to statements made by juror during deliberations inadmissible under Rule 606(b)); *United States v. Blair*, 444 F. Supp. 1273, 1274-75 (D.D.C. 1978) (evidence that one juror told another that she knew the defendant admitted under Rule 606(b) to show prejudice to defendant); *Smith v. Brewer*, 444 F. Supp. 482 (S.D. Iowa) (jurors incompetent under Rule 606(b) to present evidence regarding (1) juror statements in jury room reflecting opinion of defendant's poor character and that defendant was likely to commit other crimes unless convicted, (2) pressure brought to bear upon one juror by other jurors, and (3) racist antics of a juror during deliberations; comment by one juror during deliberations regarding his having sat as a juror on a prior murder trial considered to be extraneous information under the rule but held not prejudicial in this case), *aff'd per curiam*, No. 78-1109 (8th Cir. June 22, 1978); *Vizzini v. Ford Motor Co.*, 72 F.R.D. 132, 135-36 (E.D. Pa. 1976) (statement from juror as to compromise, confusion, and misunderstanding effect of verdict excluded; juror's thoughts and mental processes are inadmissible as evidence under Rule 606(b)), *rev'd on other grounds*, 569 F.2d 754 (3d Cir. 1977).

86. See notes 77-81 *supra* and accompanying text. As indicated by its congressional history, Rule 606(b) generally was intended to continue the common law rules relating to juror impeachment of verdicts, see notes 51-63 *supra* and accompanying text, although the rule may be more restrictive in effect. See notes 88-89 *infra* and accompanying text. That Rule 606(b) was intended to be a codification of the common law relating to juror testimony also was recognized in *Eagle*, 539 F.2d at 1170.

87. See notes 28-46 *supra* and accompanying text.

rule because it does not involve extraneous information or an influence outside of the jury room.<sup>88</sup> Second, testimony by a juror in support of a verdict would be permitted under either the majority common law approach or the Iowa rule,<sup>89</sup> because the juror is not impeaching the verdict, whereas under Rule 606(b) such testimony is excluded because jurors cannot testify “[u]pon an inquiry into the validity of a verdict . . . .” The restrictions appear to apply, however, only after the verdict has been rendered.<sup>90</sup> Thus, as under the common law, the jurors should be permitted to testify in an investigation that takes place before the jurors are discharged and separated.<sup>91</sup>

### B. Minnesota Rule 606(b)

In 1977 the Minnesota Supreme Court adopted Rule 606(b), along with other rules of evidence, for use in Minnesota state courts.<sup>92</sup> The rule was adopted without change from the federal rule,<sup>93</sup> and therefore the congressional history of federal Rule 606(b)<sup>94</sup> may be relevant as to how the rule will be interpreted by the Minnesota courts.<sup>95</sup> Further, as in the federal court system where the rule appears to be interpreted according to federal common law,<sup>96</sup> the rule probably will be construed in light of the Minnesota common law approach to juror testimony regarding jury misconduct.<sup>97</sup> Thus the Minnesota common law approach, which is similar to the Mansfield majority approach,<sup>98</sup> is still relevant to proceedings in the Minnesota courts.

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88. Although some states permitted such testimony at common law, *see* notes 17, 19-20 *supra* and accompanying text, these matters seem to fit clearly within the proscription in the rule against juror testimony as to “any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict . . . .” The exception for “extraneous prejudicial information . . . improperly brought to bear upon any juror” also does not appear to permit jurors to give evidence regarding such matters. It remains to be seen how strictly the courts will interpret the rule. One possibility is for the courts to determine that certain acts, such as a juror becoming intoxicated outside the jury room, simply are not within the rule.

89. *See* 8 J. WIGMORE, *supra* note 10, § 2354, at 714-16 (McNaughton rev. 1961 & Supp. 1977).

90. 3 J. WEINSTEIN & M. BERGER, *supra* note 65, ¶ 606[04], at 28.

91. *See, e.g.,* United States v. Pleva, 66 F.2d 529 (2d Cir. 1933) (statements by juror in open court, before recording of verdict, considered by the court). *But see* United States v. Hockridge, 573 F.2d 752, 756-60 (2d Cir. 1978) (Rule 606(b) applied to recorded partial verdict; impeachment not permitted).

92. *See* Order Promulgating the Rules of Evidence, 308 Minn. app. (1978).

93. Compare MINN. R. EVID. 606(b) with FED. R. EVID. 606(b).

94. *See* notes 51-63 *supra* and accompanying text.

95. Of course, there is no reason why the Minnesota court has to consider the federal history of the rule; although the congressional intent behind Rule 606(b) may be persuasive, it is not binding or controlling.

96. *See* notes 70-86 *supra* and accompanying text.

97. *See* notes 99-112 *infra* and accompanying text.

98. *See* notes 8-20 *supra* and accompanying text.



### 1. *Minnesota Common Law Prior to Rule 606(b)*

At common law, the Minnesota court gave approval to a number of exceptions to the rule disallowing juror testimony or affidavits to impeach a verdict, although only some of the exceptions were considered with any regularity. One of the well-established exceptions in Minnesota permitted jurors to impeach a verdict when one or more jurors took an unauthorized view of the place involved in the litigation or performed an independent experiment.<sup>99</sup> The rationale behind such an exception undoubtedly is a concern that the evidence be limited to that introduced during the trial under the proper procedural protections so that the court and the parties may control the evidence that can be considered by the jury. A second exception recognized by the Minnesota court permitted impeachment of a verdict by juror testimony when there was some indication that a juror gave false answers on voir dire which con-

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99. See *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 341-42, 191 N.W.2d 418, 423 (1971); *City of Bloomington v. Vinge*, 284 Minn. 202, 204-08, 169 N.W.2d 752, 754-56 (1969); *State v. Hayden Miller Co.*, 263 Minn. 29, 33-35, 116 N.W.2d 535, 538-39 (1962); *Briggs v. Chicago G.W. Ry.*, 248 Minn. 418, 425-26, 80 N.W.2d 625, 632-33 (1957); *Jensen v. Dikel*, 244 Minn. 71, 78-80, 69 N.W.2d 108, 113-14 (1955); *Kime v. Koch*, 227 Minn. 372, 378, 35 N.W.2d 534, 537 (1949); *Bisping v. Kummer Auto Co.*, 202 Minn. 19, 25, 277 N.W. 255, 258-59 (1938); *Spinner v. McDermott*, 190 Minn. 390, 251 N.W. 908 (1933); *Newton v. Minneapolis St. Ry.*, 186 Minn. 439, 449-50, 243 N.W. 684, 688 (1932); *Thoreson v. Quinn*, 126 Minn. 48, 147 N.W. 716 (1914); *MacKinnon v. City of Minneapolis*, 117 Minn. 261, 135 N.W. 814 (1912); *Pierce v. Brennan*, 83 Minn. 422, 86 N.W. 417 (1901), *aff'd on second appeal*, 88 Minn. 50, 92 N.W. 507 (1902); *Woodbury v. City of Anoka*, 52 Minn. 329, 54 N.W. 187 (1893); *Aldrich v. Wetmore*, 52 Minn. 164, 172-73, 53 N.W. 1072, 1074 (1893); *Koehler v. Cleary*, 23 Minn. 325 (1877).

It is not clear whether information gained from the investigation must be communicated to the other jury members. Compare *City of Bloomington v. Vinge*, 284 Minn. 202, 204-09, 169 N.W.2d 752, 754-56 (1969) and *Spinner v. McDermott*, 190 Minn. 390, 391-92, 251 N.W. 908, 908 (1933) with *Thoreson v. Quinn*, 126 Minn. 48, 50, 147 N.W. 716, 717 (1914) and *Pierce v. Brennan*, 83 Minn. 422, 86 N.W. 417 (1901), *aff'd on second appeal*, 88 Minn. 50, 92 N.W. 507 (1902). In any event, however, it must be shown that there was a reasonable certainty of prejudicial effect on the verdict. See *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 341, 191 N.W.2d 418, 423 (1971); *City of Bloomington v. Vinge*, 284 Minn. 204, 208-09, 169 N.W.2d 752, 754 (1969); *Briggs v. Chicago G.W. Ry.*, 248 Minn. 418, 425-26, 80 N.W.2d 625, 632 (1957); *State v. Siebke*, 216 Minn. 181, 189, 12 N.W.2d 186, 190 (1943); *Thoreson v. Quinn*, 126 Minn. 48, 51, 147 N.W. 716, 717 (1914); *MacKinnon v. City of Minneapolis*, 117 Minn. 261, 263, 135 N.W. 814, 815 (1912); *Lyons v. Dee*, 88 Minn. 490, 494-95, 93 N.W. 899, 901 (1903); *Koehler v. Cleary*, 23 Minn. 325, 327 (1877).

While the losing litigant bears the burden of showing actual misconduct and prejudice, see *State v. Beier*, \_\_\_ Minn. \_\_\_, \_\_\_, 263 N.W.2d 622, 626-27 (1978); *State v. Peterson*, \_\_\_ Minn. \_\_\_, \_\_\_, 262 N.W.2d 706, 707 (1978); *State v. Kyles*, \_\_\_ Minn. \_\_\_, \_\_\_, 257 N.W.2d 378, 381 (1977), the burden of proving prejudice may be lessened by a presumption that the unauthorized viewing caused prejudice. See *City of Bloomington v. Vinge*, 284 Minn. 202, 208, 169 N.W.2d 752, 756 (1969); *Spinner v. McDermott*, 190 Minn. 390, 392, 251 N.W. 908, 909 (1933); *Newton v. Minneapolis St. Ry.*, 186 Minn. 439, 449, 243 N.W. 684, 688 (1932). For a general discussion of presumptions under the Minnesota Rules of Evidence, see Thompson, *Presumptions and the New Rules of Evidence in Minnesota*, 2 WM. MITCHELL L. REV. 167 (1976).

cealed prejudice or bias toward one of the parties and thereby deprived that party of a fair trial.<sup>100</sup> Third, the Minnesota Supreme Court permitted juror testimony to impeach a verdict when there was a showing of objective circumstances and overt acts amounting to the coercion of a juror by another juror, although the court never granted a new trial on this basis.<sup>101</sup> Other acts of jury misconduct for which the court appeared to have approved the use of juror testimony or affidavits for impeachment of a verdict are intoxication of a juror,<sup>102</sup> communication between a juror and a third person,<sup>103</sup> and introduction of newspaper accounts into the deliberations.<sup>104</sup> Moreover, in one exceptional case the court

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100. See *Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (per curiam) (rule recognized but held inapplicable for failure to make timely objection); *Weber v. Stokely-Van Camp, Inc.*, 274 Minn. 482, 491-93, 144 N.W.2d 540, 545-47 (1966) (trial court's conclusion that false answers on voir dire had not been shown upheld); *State v. Hayden Miller Co.*, 263 Minn. 29, 33-35, 116 N.W.2d 535, 538-39 (1962) (jurors should be examined to determine if false answers were given on voir dire); *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 327-28, 104 N.W.2d 301, 302-03 (1960) (untruthful answers on voir dire prevent litigant from having a fair trial; to obtain relief, jurors should be examined in court in presence of counsel); *Carl Lindquist & Carlson, Inc. v. Johanson*, 182 Minn. 529, 235 N.W. 267 (1931) (no evidence that juror was acquainted with defendant; juror testified in denial of acquaintance).

A reason for the exception might be that if a juror has given false answers to questions on voir dire where he could have been excluded for cause had he answered truthfully, that person was never eligible to be a juror from the start. Thus, the jury's vote was void and therefore there was no verdict to be impeached. See 15 *BUFFALO L. REV.* 217, 220 (1966) (discussing New York law).

101. See *State v. Hoskins*, 292 Minn. 111, 125-27, 193 N.W.2d 802, 812-13 (1972); *Jensen v. Dikel*, 244 Minn. 71, 78-79, 69 N.W.2d 108, 113-14 (1955); *State v. Gavle*, 234 Minn. 186, 208-11, 48 N.W.2d 44, 56-58 (1951). Prior to *Gavle*, however, the court had refused to permit juror testimony as to coercion. See *State v. Hook*, 176 Minn. 604, 607-08, 224 N.W. 144, 145-46 (1929); *Wester v. Hedberg*, 68 Minn. 434, 435-36, 71 N.W. 616, 616-17 (1897).

102. See *State v. King*, 88 Minn. 175, 185, 92 N.W. 965, 969 (1903) (even conceding that jurors may show intoxication by affidavit or testimony, it is within the discretion of the trial court to permit such evidence as there is no absolute right to have the jurors examined orally).

103. See *State v. Olek*, 288 Minn. 235, 242-43, 179 N.W.2d 320, 326 (1970) (evidentiary hearing held at which juror testimony was heard relating to juror's statements to third party); *Schoeb v. Cowles*, 279 Minn. 331, 333-34, 156 N.W.2d 895, 897 (1968) (juror affidavit considered as to observation of other jurors conversing with one of the parties).

104. While the Minnesota court does not appear to have stated specifically that jurors are competent to give evidence relating to the consideration of newspaper accounts, an inference that such testimony will be permitted can be drawn from several cases. See *State v. Beier*, \_\_\_\_ Minn. \_\_\_\_, 263 N.W.2d 622 (1978) (posttrial hearing held to determine if publicity was discussed in jury room and if it infected the verdict); *State v. Johnson*, 307 Minn. 501, 506-07 & n.2, 239 N.W.2d 239, 243 & n.2 (1976) (per curiam) (citing *MINN. R. CRIM. P.* 26.03(8)-(9) which allows a verdict to be set aside when, on the basis of competent evidence, the court determines that the verdict was affected by the jurors' exposure to extra-record matters relating to the defendant or the case itself); *State v. Collins*, 276 Minn. 459, 473-77, 150 N.W.2d 850, 860-62 (1967) (juror affidavit that he read news article considered), *cert. denied*, 390 U.S. 960 (1968). But see *State v. Lentz*, 45 Minn. 177, 183, 47 N.W. 720, 722 (1891) (affidavits of jurors that during deliberations jurors had newspaper containing evidence given at trial inadmissible to impeach verdict).

indicated it would have been proper to examine the jurors where allegations were made that the jury may have considered improper matter in disregard of the court's instructions.<sup>105</sup>

In Minnesota the court generally was consistent in its refusal to consider evidence given by jurors of acts or discussion that took place within

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105. In *Schrupp v. Hanson*, 306 Minn. 151, 235 N.W.2d 822 (1975), the court was confronted with allegations that the jury had denied the plaintiff relief, even though it had found that the defendants' operation of a chicken farm constituted a nuisance, because of the jury's speculation on the effect which such a decision would have on other chicken farms in the county. The trial court had instructed the jury that it was not to consider the legal consequences of its verdict or any evidence not submitted from the witness stand at trial. The plaintiff requested that the trial court hold a hearing to investigate the allegations, which was refused on the basis that "a hearing in this case would be delving into the mental processes of jurors as to how they arrived at their verdict and the law seems to be clear that this is not an area for the Court to become involved in." *Id.* at 153-54, 235 N.W.2d at 824. The Minnesota Supreme Court, finding that "the facts giving rise to this litigation strongly suggest a miscarriage of justice which may be attributable to the jury's misconceiving their duty," *id.* at 154, 235 N.W.2d at 824, stated: "It was, therefore, incumbent on the trial court to conduct at least a preliminary inquiry into the validity of the hearsay charges that the jury found defendants' operation constituted a nuisance but, nevertheless, denied plaintiffs relief." *Id.* The court determined that inasmuch as the jury had long since been discharged, it would be inappropriate to conduct such a hearing, and therefore a new trial was required. *Id.* at 155, 235 N.W.2d at 824.

Thus, the *Schrupp* court appears to have suggested that the jurors should have been permitted to testify as to their thought processes in reaching the verdict. This decision, therefore, may be viewed as a substantial departure from the general Minnesota common law rules relating to the types of misconduct about which jurors will be allowed to testify. See notes 99-104 *supra*, 106-12 *infra* and accompanying text. Even if *Schrupp* is seen as involving only disregard of the judge's instructions, under the common law rule the jurors would be incompetent to testify as to what matter they considered in reaching a verdict. See notes 106-12 *infra* and accompanying text.

The possibility exists, however, that even though the entire opinion dealt with the alleged misconduct of the jury, a new trial was granted solely "in the interests of justice." See 306 Minn. at 155, 235 N.W.2d at 824. Granting a new trial in the interests of justice, though it might appear to be within the power of the court, is not, without more, legally justifiable. The court has held that Minnesota does not authorize granting a new trial solely in the interest of justice, the grounds for a new trial as enumerated in MINN. R. CIV. P. 59.01 being exclusive. See *Ginsberg v. Williams*, 270 Minn. 474, 135 N.W.2d 213, 220 (1965). However, under MINN. R. CRIM. P. 26.04, subd. 1(1), a new trial may be granted in the interests of justice in a criminal case. See, e.g., *State v. Stewart*, 297 Minn. 57, 209 N.W.2d 913 (1973) (*per curiam*).

Regardless of the basis on which a new trial was granted in *Schrupp*, the court undoubtedly had no intention of broadening the area of juror impeachment of verdicts. This is evidenced by the court's summary rejection of a complaint of juror misconduct during deliberations in a case decided only two months after *Schrupp*. In *Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 238 N.W.2d 608 (1976) (*per curiam*), the court refused even to consider allegations of misconduct, stating that Minnesota follows the rule that improper conduct which occurs during deliberations cannot be shown by testimony of the jurors themselves. *Id.* at 572, 238 N.W.2d at 609. This suggests that the *Schrupp* opinion may be given little, if any, precedential weight in future jury misconduct cases. When there is reason to suspect that extra-record matter is considered during the deliberations as occurred in *Schrupp*, however, the court should be encouraged to hold a hearing at which the jurors are permitted to testify to determine the truth of the allegations.

the jury room.<sup>106</sup> Thus, the court has excluded juror affidavits or testimony regarding quotient verdicts,<sup>107</sup> statements during deliberations,<sup>108</sup> and consideration of improper matter.<sup>109</sup> Even when the verdict was alleged to have resulted from misconduct that might entitle the losing litigant to a new trial, the court refused to allow the verdict to be impeached by the jurors.<sup>110</sup> When evidence of jury misconduct was presented in the form of juror affidavits or testimony, such evidence, unless permitted by one of the specific exceptions,<sup>111</sup> was often excluded by stating the familiar rubric that jurors cannot testify to matters that inhere in the verdict.<sup>112</sup> Thus, the court's position was consistent with the Mansfield majority approach.<sup>113</sup>

## 2. Minnesota Law After Adoption of Rule 606(b)

In some respects, the adoption of Rule 606(b) probably will not change the Minnesota exceptions under which a juror is permitted to impeach a verdict. Juror testimony regarding an independent inspection or experiment,<sup>114</sup> communication between a juror and a third person,<sup>115</sup> and

106. See *Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (per curiam); *State v. Hoskins*, 292 Minn. 111, 125, 193 N.W.2d 802, 812 (1972); *Kronberg v. Bondhus*, 164 Minn. 446, 450, 205 N.W. 371, 372 (1925); *State v. Lentz*, 45 Minn. 177, 183, 47 N.W. 720, 722 (1891). On the other hand, it has been held that jurors can testify as to acts that take place outside the jury room. See *Brown v. Duluth, S.S. & A. Ry.*, 147 Minn. 167, 170-71, 179 N.W. 1003, 1005 (1920); *Hurlburt v. Leachman*, 126 Minn. 180, 148 N.W. 51 (1914); *Pierce v. Brennan*, 83 Minn. 422, 86 N.W. 417 (1901); *Rush v. St. Paul Ry.*, 70 Minn. 5, 11, 72 N.W. 733, 735 (1897).

107. See *Dahlin v. Fraser*, 206 Minn. 476, 479, 288 N.W. 851, 853 (1939); *Hoffman v. City of St. Paul*, 187 Minn. 320, 323-24, 245 N.W. 373, 375 (1932); *Keane v. Butner*, 150 Minn. 90, 93, 184 N.W. 571, 572 (1921); *Bradt v. Rommel*, 26 Minn. 505, 5 N.W. 680 (1880) (per curiam); *St. Martin v. Desnoyer*, 1 Minn. 156, 158-60 (Gil. 131, 133-35) (1858).

108. See *Kronberg v. Bondhus*, 164 Minn. 446, 450, 205 N.W. 371, 372 (1925). See also *Bauer v. Kummer*, 244 Minn. 488, 490-91, 70 N.W.2d 273, 275 (1955) (affidavits or testimony inadmissible to prove jurors misconceived legal effect of their verdict).

109. See *State v. Lentz*, 45 Minn. 177, 183, 47 N.W. 720, 722 (1891). See also *Bauer v. Kummer*, 244 Minn. 488, 490-91, 70 N.W.2d 273, 275 (1955) (jury's misconception of legal effect of verdict may not be proven by juror affidavits or testimony). But see note 104 *supra* and accompanying text (juror testimony might be permitted to show that jurors considered improper matter brought to their attention through an extrajudicial source).

110. See *Hoffman v. City of St. Paul*, 187 Minn. 320, 323-24, 245 N.W. 373, 375 (1932).

111. See notes 99-105 *supra* and accompanying text.

112. See *Nebben v. Kosmalski*, 307 Minn. 211, 217, 239 N.W.2d 234, 238 (1976); *State v. Hoskins*, 292 Minn. 111, 125, 193 N.W.2d 802, 812 (1972); *Bauer v. Kummer*, 244 Minn. 488, 490-91, 70 N.W.2d 273, 275 (1955); *State v. Lentz*, 45 Minn. 177, 183-84, 47 N.W. 720, 722 (1891).

This position has not been accepted by all legal scholars, however. Judge Learned Hand commented that "judges again and again repeat the consecrated rubric which has so confused the subject; it offers an easy escape from embarrassing choices." *Jorgensen v. York Ice Mach. Corp.*, 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947).

113. See notes 8-20 *supra* and accompanying text.

114. See note 99 *supra* and accompanying text.

115. See note 103 *supra* and accompanying text.

consideration of newspaper accounts<sup>116</sup> probably will continue to be permitted under the Rule 606(b) exception providing for testimony about extraneous prejudicial information. This exception should also be construed to permit juror impeachment of verdicts when it is alleged that a juror lied or otherwise concealed prejudice on voir dire, on the basis that the juror is introducing extraneous matter into the deliberations that could have been excluded by excusing that juror.<sup>117</sup>

In some other respects, Rule 606(b) probably will change the Minnesota exceptions under which a juror may impeach a verdict. Testimony as to the coercion of a juror by another juror<sup>118</sup> and the intoxication of a juror<sup>119</sup> probably will not be permitted, as these two types of misconduct do not appear to fit within either the extraneous information exception or the outside influence exception of Rule 606(b).<sup>120</sup> The rule thus would appear to have a narrowing effect on the law in Minnesota. At this time the court has not been confronted with any cases in which an interpretation of Rule 606(b) has been an issue, and therefore the question of what approach the court will take in interpreting the exceptions provided in the rule remains open.

### 3. Procedure for Receiving Juror Testimony

Rule 606(b) does not address the manner in which juror testimony permitted by one of the exceptions is to be elicited.<sup>121</sup> Once a litigant has determined the grounds on which the verdict may be impeached by juror testimony, actual jury misconduct must be established. Courts in many states have allowed a motion for a new trial to be accompanied by affidavits of the jurors.<sup>122</sup> In some states, jury misconduct may be established both by affidavits of jurors and third persons, and by their testimony in a special court session.<sup>123</sup> A few courts require the moving

116. See note 104 *supra* and accompanying text.

117. See note 100 *supra* and accompanying text. The court might also continue to permit such evidence on the basis that the rule was intended to govern only conduct of jurors occurring during the trial. See MINN. R. EVID. 606(b) (rule governs testimony as to matters "occurring during the course of the jury's deliberations").

118. See note 101 *supra* and accompanying text.

119. See note 102 *supra* and accompanying text.

120. For a discussion of the need to change the rule to permit juror testimony regarding the coercion of one juror by another, see Carlson & Sumberg, *supra* note 25, at 270-73.

121. See MINN. R. EVID. 606(b), Comment.

122. See, e.g., *People v. Hutchinson*, 71 Cal. 2d 342, 346-51, 455 P.2d 132, 134-37, 78 Cal. Rptr. 196, 198-201 (1969) (in bank) (Traynor, C.J.); *Hackaday v. Brackelsburg*, 248 Iowa 1346, 1350, 85 N.W.2d 514, 516 (1957); *Christensen v. Farmers State Bank*, 157 N.W.2d 352, 359 (N.D. 1968); *Fales v. Kaupp*, 83 S.D. 487, 491, 161 N.W.2d 855, 857 (1968); *Walker v. Missouri Pac. R.R.*, 425 S.W.2d 462, 466 (Tex. Civ. App. 1968); *Gardner v. Malone*, 60 Wash. 2d 836, 839, 376 P.2d 651, 653 (1962), *modified on other grounds*, 61 Wash. 2d 669, 379 P.2d 918 (1963).

123. See *Bashford v. Slater*, 250 Iowa 857, 867, 96 N.W.2d 904, 910 (1959); *Skinner v. Cron*, 206 Iowa 338, 343, 220 N.W.2d 341, 343 (1928); *Allan v. Materials Transp. Co.*, 372 S.W.2d 744, 747-48 (Tex. Civ. App. 1963).

party to establish the existence of prejudicial misconduct totally by sources other than jury members prior to receiving juror testimony.<sup>124</sup>

The position taken by the Minnesota court is that neither attorneys nor their agents may question jurors after trial to determine whether the verdict was affected by any acts of misconduct.<sup>125</sup> Instead, litigants must wait until they are approached by a juror or other person with knowledge of possible jury misconduct.<sup>126</sup> The aggrieved party then may request that the trial court hold what is commonly referred to as a *Schwartz*

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124. The Wisconsin Supreme Court in *Ford Motor Credit Co. v. Amodt*, 29 Wis. 2d 441, 139 N.W.2d 6 (1966), held that jurors were foreclosed from impeaching their own verdict, even where the assertion was made that the verdict was improperly recorded. Under *Ford*, a juror cannot challenge the verdict once the jury is discharged. The court did leave room for a challenge to the verdict by someone other than a juror, however, if that person has substantial and direct personal knowledge of the alleged impropriety not derived from a juror after discharge and if the challenge to the integrity of the verdict did not originate from a juror. *Id.* at 450, 139 N.W.2d at 11. In such a case, the court will allow interrogation of the juror by the court to determine if an irregularity has occurred. *See id.* The court clarified its position further in *Miller v. Illinois Cent. R.R.*, 36 Wis. 2d 184, 162 N.W.2d 898 (1967), which held that jurors could not impeach a verdict, whether the misconduct occurred inside or outside the courtroom. *See id.* at 192-94, 152 N.W.2d at 902-03. This position is a strict application of the Mansfield rule.

A similar position appears to be taken by the court in Ohio, where the rule on juror testimony is known as the "aliunde" rule.

[T]here is no rule or provision of law or public policy that prohibits the informal interrogation of a juror after the return of a verdict. A juror so interviewed may respond or not as he sees fit, but any statement made by the juror as to his or any other juror's conduct in or out of the jury room is inadmissible for the purpose of impeaching the verdict in the absence of evidence aliunde.

*Patrick v. Yellow Cab Co.*, 102 Ohio App. 312, 314, 114 N.E.2d 735, 736 (1953) (per curiam). *See also* Comment, *After the Verdict: May Counsel Interrogate Jurors?*, 17 CATH. U.L. REV. 465 (1968).

125. *See Zimmerman v. Witte Transp. Co.*, \_\_\_ Minn. \_\_\_, 259 N.W.2d 260 (1977) (purpose of rule is to avoid harassment of jurors); *Baker v. Gile*, \_\_\_ Minn. \_\_\_, 257 N.W.2d 376 (1977); *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971) (improper for attorney to interrogate jurors for purposes of gathering evidence for a request for a *Schwartz* hearing); *Weber v. Stokely-Van Camp, Inc.*, 274 Minn. 482, 494, 144 N.W.2d 540, 547 (1966); *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). However, MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29 states in part:

After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.

This ethical consideration appears to be in direct conflict with Minnesota case law which prohibits interviews with jurors after trial for the purpose of determining whether the verdict was affected by juror misconduct. It may be that the ethical consideration, adopted in 1970, has been superseded by *Olberg* and other subsequent Minnesota case law.

126. *See* cases cited in note 125 *supra*.

hearing.<sup>127</sup> At the *Schwartz* hearing jurors are examined, with proper safeguards, in the presence of counsel for all interested parties and the trial judge<sup>128</sup> to determine the existence of misconduct and whether it was prejudicial.<sup>129</sup> Should a party fail to follow the proper procedure for establishing jury misconduct, the court has stated it will decline to consider a claim of jury misconduct.<sup>130</sup> Moreover, in all cases the aggrieved litigant must notify the trial court immediately upon learning of the misconduct; otherwise the claim of jury misconduct is deemed waived.<sup>131</sup>

Strict adherence to a rule forbidding litigants from making the initial

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127. The basis for the *Schwartz* hearing was laid in *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 N.W.2d 301 (1960). The *Schwartz* court realized that cases will arise where a juror's untruthful answers to questions on voir dire will prevent a fair trial. Should such facts come to light after the rendition of a verdict, there should be some means available for obtaining relief. Rather than allowing defeated litigants' attorneys or investigators to interrogate jurors, the court felt that a better practice would be to "bring the matter to the attention of the trial court, and, if it appears that the facts justify so doing, the trial court may summon the juror before him and permit an examination in the presence of counsel for all interested parties . . . under proper safeguards." *Id.* at 328, 104 N.W.2d at 303. This would allow the making of a record which could be presented to an appellate court for review should there be any doubt about the trial court's ruling after the hearing.

The time to request a *Schwartz* hearing is "when the first suspicion of misconduct arises." *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971). The *Olberg* court further stated that "[n]othing should prevent the trial court from ordering a *Schwartz* hearing on the grounds of an oral assertion by counsel or hearsay affidavit." *Id.* Thus, trial courts should be "liberal" in granting such hearings, *see id.* at 343, 191 N.W.2d at 425, although it is within their discretion to do so. *See Zimmerman v. Witte Transp. Co.*, \_\_\_ Minn. \_\_\_, \_\_\_, 259 N.W.2d 260, 263 (1977); *Easton Farmers Elevator Co. v. Chromalloy Am. Corp.*, \_\_\_ Minn. \_\_\_, \_\_\_, 246 N.W.2d 705, 712 (1976).

128. *See Zimmerman v. Witte Transp. Co.*, \_\_\_ Minn. \_\_\_, \_\_\_, 259 N.W.2d 260, 262 (1977); *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960).

129. *See State v. Beier*, \_\_\_ Minn. \_\_\_, \_\_\_, 263 N.W.2d 622, 625-27 (1978); *State v. Kyles*, \_\_\_ Minn. \_\_\_, \_\_\_, 257 N.W.2d 378, 381 (1977); *Schrupp v. Hanson*, 306 Minn. 151, 154, 235 N.W.2d 822, 824 (1975); *State v. Olek*, 288 Minn. 235, 242-43, 179 N.W.2d 320, 326 (1970); *State v. Hayden Miller Co.*, 263 Minn. 29, 33-35, 116 N.W.2d 535, 538-39 (1962). After holding a *Schwartz* hearing, it is within the discretion of the trial court to grant or deny a new trial. *See State v. Beier*, \_\_\_ Minn. \_\_\_, \_\_\_, 263 N.W.2d 622, 627 (1978); *State v. Kyles*, \_\_\_ Minn. \_\_\_, \_\_\_, 257 N.W.2d 378, 381 (1977). *But cf. State v. Hayden Miller Co.*, 263 Minn. 29, 34-35, 116 N.W.2d 535, 539 (1962) (abuse of trial court's discretion to deny continuance for purposes of examining alleged irregularities; court indicated that under facts here present, *Schwartz* hearing was mandated).

130. *See Baker v. Gile*, \_\_\_ Minn. \_\_\_, \_\_\_, 257 N.W.2d 376, 378 (1977) (suggesting that "trial courts decline petitions for *Schwartz* hearings based upon information obtained improperly").

131. *See Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (per curiam); *State v. O'Donnell*, 280 Minn. 213, 219-20, 158 N.W.2d 699, 703 (1968); *State v. Collins*, 276 Minn. 459, 477, 150 N.W.2d 850, 862 (1967), *cert. denied*, 390 U.S. 960 (1968).

contact in an effort to determine whether the verdict was affected by jury misconduct may allow some verdicts so affected to escape detection.<sup>132</sup> On the other hand, the *Schwartz* procedure satisfies the needs of the judicial system in at least three respects. First, requiring an in-court hearing rather than allowing individual interviewing of jurors avoids the possibility of juror harassment after trial.<sup>133</sup> Second, when there is an indication that the jury engaged in misconduct, the misconduct can be established by the jurors themselves in a court hearing where they can be questioned by both parties and the court, with all the judicial safeguards.<sup>134</sup> Finally, examining the jurors in court and under oath has the benefit of creating a record which can be reviewed on appeal.<sup>135</sup> Because Rule 606(b) does not deal with the manner in which the jurors will testify when impeachment is permitted,<sup>136</sup> it should not affect the *Schwartz* hearing requirement.

#### IV. AN EVALUATION OF THE POLICIES UNDERLYING RULE 606(b)

The premise on which Rule 606(b) and its common law counterparts seem to be based is that the jury system must be protected, even at the expense of individual litigants.<sup>137</sup> But, while the jury system deserves respect, it is by no means infallible. The deficiencies of the jury system and the fact that these deficiencies can result in injustice to litigants should be recognized. This does not necessarily mean that litigants

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132. In *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 191 N.W.2d 418 (1971), the court stated:

Many cases may arise where there is utterly no suspicion of jury misconduct. It may be argued that in such situations, a *Schwartz* hearing is possible only after a juror has been contacted by the losing party. The answer to this argument is simply that attorneys should not be allowed to contact and harass jurors who render verdicts of a nonsuspicious nature.

*Id.* at 344, 191 N.W.2d at 425. But see MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29, quoted in note 125 *supra*. The court would, however, allow attorneys to question jurors who take the initiative to report what they think might be misconduct. *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 344, 191 N.W.2d 418, 425 (1971); see *Zimmerman v. Witte Transp. Co.*, \_\_\_ Minn. \_\_\_, \_\_\_, 259 N.W.2d 260, 263 (1977).

133. See *Zimmerman v. Witte Transp. Co.*, \_\_\_ Minn. \_\_\_, \_\_\_, 259 N.W.2d 260, 262-63 (1977); *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). The Code of Professional Responsibility also restricts an attorney from harassing jurors after the trial. See MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D)-(G), EC 7-29.

134. See notes 128-29 *supra* and accompanying text.

135. See *Zimmerman v. Witte Transp. Co.*, \_\_\_ Minn. \_\_\_, \_\_\_, 259 N.W.2d 260, 263 (1977); *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). A record, of course, is created in states that allow the misconduct to be established through affidavits of jurors, but it can be argued that such a record would not be as complete or accurate as one created by testimony and cross-examination.

136. See MINN. R. EVID. 606(b), Comment.

137. See, e.g., *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915); *Hoffman v. City of St. Paul*, 187 Minn. 320, 324, 245 N.W. 373, 375 (1932) (possible injustice of the rule to individual litigants recognized but the rule followed as a matter of public policy).



should be permitted to know everything that occurs in the jury room or in the jurors' minds. But it does suggest that Rule 606(b) and the common law rules on the competency of jurors to impeach their verdict are weighted too heavily in favor of juror protection and that sufficient deference is not given to the litigant's interest in a fair trial.

With this imbalance recognized, the justifications underlying the rule against juror testimony must be analyzed to see if they outweigh the occasional harm that may result from application of the rule. The two most significant policy justifications for the rule appear to be the need for privacy in jury deliberations and the need for finality in judicial decisions.<sup>138</sup>

### A. Privacy of Deliberations

For the jury system to function properly, jurors must be free from unwarranted harassment after they have rendered their verdict. Freedom and frankness of discussion, essential to the thorough consideration of the matters at hand, may be inhibited by the jurors' knowledge that they might be subjected to post-trial examination regarding the reasons for their decision.<sup>139</sup>

Underlying the privacy rationale, therefore, is the belief that jurors might be inhibited in the give and take of their discussions and harassed by unhappy litigants if the rule against juror testimony was liberalized.<sup>140</sup> Although privacy during deliberations is desirable, such a severe

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138. See *United States v. Hockridge*, 573 F.2d 752, 758-60 (2d Cir. 1978); Carlson & Sumberg, *supra* note 25, at 250-51. It also has been suggested that a third policy argument for the rule is that the rule lessens the possibility of tampering with the jury after the verdict. *Id.* at 251. This policy rationale holds little weight in Minnesota where the jurors are subject to examination in a *Schwartz* hearing, in which they can be examined thoroughly to determine whether they were subjected to any tampering. See notes 125-35 *supra* and accompanying text.

139. Cf. Note, *Tortious Invasion of Privacy: Minnesota as a Model*, 4 WM. MITCHELL L. REV. 163, 177 & n.65 (1978) (privacy important for protection of personal choice).

140. The rule excluding juror testimony to impeach a verdict is believed a necessity to protect what is intended to be a private deliberation. The policy behind the rule perhaps was best expressed in *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915), where the Court stated:

The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

. . . [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used,

restriction against post-verdict juror testimony may be unnecessary. If post-trial juror testimony is carefully controlled to avoid abusive practices, the rule governing juror testimony probably could be liberalized without major negative repercussions on deliberations or juror privacy.

Under a liberalized rule, it is doubtful whether jurors would feel inhibited from engaging in free and frank discussion during deliberations. Because the verdict is made public and because most verdicts must be unanimous, the individual juror's vote will be known regardless of the type of rule governing juror testimony. Moreover, after trial the jurors are free to discuss any aspect of the deliberation among themselves as well as others,<sup>141</sup> thus indicating that absolute privacy is not essential. Finally, it is questionable whether jurors even realize they are subject to post-verdict interrogation or give it any thought while involved in the deliberations, suggesting that the free flow of discussion will not be inhibited by exposure. Indeed, some awareness that they could be questioned as to how they reached their verdict might cause jurors to be more conscientious in avoiding juror misconduct. Thus, it appears to be questionable whether a more liberalized rule would seriously affect the privacy of jury deliberations.

The concern that jurors might be harassed after trial if the rule is liberalized is valid, but it can be avoided by means less drastic than the narrow grounds for impeachment under Rule 606(b). The *Schwartz* hearing in Minnesota is very effective in this regard. If a litigant suspects that jury misconduct occurred, the jurors may not be approached directly; rather, the litigant must petition the court for a *Schwartz* hearing to which the jurors can be summoned and questioned.<sup>142</sup> Under this procedure, the risk of juror harassment is minimized. Moreover, under the Code of Professional Responsibility, attorneys are restricted in the manner in which they may approach a juror concerning jury misconduct,<sup>143</sup> adding further assurance that juror harassment could be minimized under a liberalized rule on juror testimony. Thus, while the need for privacy in jury deliberations cannot be ignored, the strict requirements of Rule 606(b) do not appear to be justified sufficiently by the privacy rationale.

### B. Finality of Verdicts

A second justification for a strict rule against juror testimony as to

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the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

141. See, e.g., *United States v. Homer*, 411 F. Supp. 972, 978 (W.D. Pa.) (after completing their duties jurors have the right to free speech and can talk to whom they please about how and why they reached their verdict), *aff'd per curiam*, 545 F.2d 864 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

142. See notes 125-31 *supra* and accompanying text.

143. See MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D)-(G), EC 7-29.

jury misconduct is the need for finality of verdicts. As with the privacy rationale, this justification has some merit; litigation must end at some point. The rights of the litigants must be finally established and the court system must be cleared of cases which have been resolved. One can question, however, whether the need for finality is more important than the interest in a trial by a fair and impartial jury which reaches its verdict in accordance with the law and the facts presented to it at trial.

Furthermore, the rule against impeachment of verdicts through juror testimony only indirectly encourages finality of verdicts. Finality is directly affected by the rules as to what constitutes jury misconduct; Rule 606(b) only serves to limit the proof available to establish jury misconduct.<sup>144</sup> Under the rule, the testimony of jurors only is excluded, not that of third persons who have independent knowledge of jury misconduct. Thus, for example, a person who is not a juror and who acquires information about jury misconduct through a breach of duty (such as a bailiff listening to the deliberations) may be able to testify despite that person's turpitude, whereas the jurors who may best be able to testify cannot, merely because of their status as jurors.

Strictly in terms of finality, a better rule would be to define the specific acts which constitute jury misconduct rather than to specify the persons who will be permitted to testify as to the misconduct. Then, if it is alleged that the jury or one of its members committed one of the defined acts, the court could hold a hearing to determine whether the allegation was true and whether the misconduct was prejudicial. Under such a rule, the jurors, as well as third parties, could be interrogated with respect to whether the specific act was committed.

Under the present rule, whether a litigant will receive a new trial based on jury misconduct may depend solely on whether a juror or a person other than a juror witnessed the misconduct, regardless of the

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144. The greatest criticism of the rule disallowing juror testimony centers on the fact that the jurors are generally the sole witnesses to the misconduct. Thus the rule often operates to exclude the only available evidence. This may not be entirely true, however, as the courts, at least in the federal system, appear to say one thing but do another. In *Klimes v. United States*, 263 F.2d 273 (D.C. Cir. 1959), then Circuit Judge Burger stated for the court:

Courts have again and again ostensibly endorsed Mansfield's rule against the use of jurors' statements, but it appears that, almost without exception, where it has been said that a juror's affidavit or testimony is "inadmissible," the court has in fact considered what the juror has said but rejected it as insufficient. Judge Learned Hand has criticized this approach as "an easy escape from embarrassing choices." The crux of the problem would be more clear if we regard the issue not as the *admissibility* of the juror's affidavit but rather its *sufficiency* for purposes of impeaching the verdict. We should not dispose of this case on a ground of admissibility; rather we should view it as Judge Hand did and consider what the affidavit says, and assuming its truth for these purposes then decide whether it should lead to reversal.

Id. at 274 (footnote omitted) (emphasis in original).

prejudicial effect of the misconduct. Such a result seems unfair and unsound. If finality really is a concern underlying the rule, then it should be protected by standards for jury misconduct rather than rules creating distinctions as to who can testify regarding such misconduct. While finality is a legitimate interest, it is unsound to protect that interest by precluding juror testimony as to jury misconduct.

## V. CONCLUSION

When such a rule is completed and rounded, the corners smoothed and the content cohesive and coherent, it is likely to become a thing in itself, a work of art. It is then like a finely engineered bridge or completed painting. One hates to disturb it. Even if knowledge and experience should demonstrate its obsolescence, one hates to tear it down because it has existed so long in its original design.<sup>145</sup>

The rule barring juror testimony to impeach a verdict has indeed been in existence a long time, and now is codified in Minnesota in Rule 606(b). While the various jurisdictions disagree as to what acts of misconduct are susceptible to impeachment by jurors, Rule 606(b) takes a relatively narrow approach to the problem. No one would disagree that the general acceptance of impeachment evidence raises the possibility of interference with private deliberations, prolonged litigation, and unsettled verdicts, but it is the position of this Note that protections are available to avoid most of these problems without complete exclusion of the juror's testimony. A strict interpretation of Rule 606(b) can suppress the best and often the only evidence of jury misconduct, thereby preventing an injured litigant from obtaining any form of relief. The public policies behind the exclusion must be balanced against the probable injury to litigants and the goal of the system to achieve justice. A rule which conceals the failure of jurors to perform their sworn duty to render a fair and impartial verdict according to law diminishes, rather than enhances, the justice achieved. When a litigant is prejudiced by the misconduct of jurors, that litigant should have the right to produce evidence of the misconduct from all reliable sources, including the jurors themselves. A liberalized rule, such as the Iowa approach,<sup>146</sup> whereby jurors are permitted to testify under procedural safeguards to overt acts or statements indicating misconduct would further the ends of justice more than the present Rule 606(b). The *Schwartz* hearing would provide the necessary safeguards.

Thus, the Minnesota Supreme Court should reconsider the propriety of Rule 606(b). While it might be suggested that the restrictive approach

145. *Kollert v. Cundiff*, 50 Cal. 2d 768, 775, 329 P.2d 897, 901 (1958) (Carter, J., dissenting in part) (commenting critically on the rules as to inadmissibility of juror affidavits to establish jury misconduct).

146. See notes 21-27 *supra* and accompanying text.

taken by the rule can be modified through a broad interpretation of its exceptions, the common law in Minnesota would not appear to permit much liberalization in this manner. Rather, the court is encouraged to redraft the rule in line with the Iowa approach. Permitting juror testimony to impeach verdicts in line with the Iowa approach would further the goal of justice without unduly jeopardizing the integrity of the jury system.